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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 239 Misc.

KOKI HIROTA, *Petitioner*,

v.

GENERAL OF THE ARMIES DOUGLAS MACARTHUR, ET AL.

No. 240 Misc.

KENJI DOHIHARA, *Petitioner*,

v.

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No. 248 Misc.

KOICHI KIDO, TAKASUMI OKA, KENRYO SATO, SHIGETARO SHIMADA, and SHIGENORI TOGO, *Petitioners*

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AMICUS CURIAE BRIEF OF THE NATIONAL LAWYERS GUILD ON PETITION FOR WRIT OF HABEAS CORPUS.

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AMICUS CURIAE BRIEF OF THE NATIONAL LAWYERS GUILD ON PETITION FOR WRIT OF HABEAS CORPUS.

The National Lawyers Guild is a national association of members of the Bar. Important among its objectives is that of promoting the rule of law in international relations, and strengthening the United Nations. Because it believes that intervention by this Court would violate agreements

of the co-equal Allied national states and impair the legal structure for the occupation of Japan, it has secured the consents of the parties to the filing of this brief as amicus curiae.

ARGUMENT.

Because the constitution of the International Military Tribunal for the Far East resulted from the legal acts of several co-equal national states, allied in war against the state of Japan, its proceedings and determinations should not be subject to unilateral judiciary review by the national courts of any of such co-equal allied States, including the Supreme Court of the United States. A decision by the Supreme Court of the United States to review the determinations of the International Military Tribunal for the Far East would, by violating the consensual acts of the co-equal Allied national states, impair the legal structure for the occupation of Japan, and imply to other Allied national states, that the United States, speaking through its Supreme Court, now regrets its agreements with its co-equal Allies, and in reviewing the proceedings and determinations of the Military Tribunal for the Far East is contravening the international agreements made with them.

The International Military Tribunal for the Far East was constituted an international tribunal in compliance with a Potsdam Declaration of July 26, 1945, which stated that "* * * stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners" (Activities of the Far Eastern Commission (1947), Dept. of State Publ. 2888, Far Eastern Series 24 (1947).)

This particular Potsdam Declaration was the legal act of the United States, China and Great Britain. The Yalta Agreement of February 11, 1945, which provided that the Union of Socialist Soviet Republics should in due course enter the war against Japan (Occupation of Japan, Department of State Publ. 2671, Far Eastern Series 52 [n.d.]) prepared the legal foundation for subsequent participation

by the Soviet Union in the international legal acts, such as this Potsdam Declaration and others, which justified the process against Japanese war criminals.

On August 14, 1945, President Truman announced that Japan had submitted to the Potsdam Declaration (*id.* 59); such submission was provided for in the Instrument of Surrender (*id.* 62), and presumably was "nationalized" under Japanese conceptions of international and constitutional law by an Imperial Rescript of September 2, 1945 (*id.* 64).

It is not necessary to discuss whether consensual legal relations were created with occupied Japan by such submission, because the international character of the International Military Tribunal for the Far East was established by the legal act *inter se* of the co-equal Allied states on December 27, 1945 at the time of the Moscow Meeting of Foreign Secretaries. This conference, which was held in consequence of the Potsdam Declaration and the Yalta Agreement, brought together the representatives of the United States, the Soviet Union and the United Kingdom. With the concurrence of China, they established Terms of Reference for the creation and functions of a Far Eastern Commission (FEC) (Far Eastern Series 24, at p. 36), in which eleven national states were to participate.

Article II. A. 1 of the Terms of Reference states that it is the function of the Far Eastern Commission—

> "To formulate the policies, principles and standards in conformity with which the fulfillment by Japan of its obligations under the Terms of Surrender may be accomplished,"

Article II. A. 2 gave the Far Eastern Commission the function—

> "To review on the request of any member any directive issued to the Supreme Commander for the Allied Powers or any action taken by the Supreme Commander involving policy decisions within the jurisdiction of the Commission."

Article III. 1 of the Terms of Reference stipulated that—

> "The United States Government shall prepare directives in accordance with policy decisions of the Commission and shall transmit them to the Supreme Commander through the appropriate United States Government agency. The Supreme Commander shall be charged with the implementation of the directives which express the policy decisions of the Commission."

Acting under the Terms of Reference, the preamble of FEC Policy Decision of June 19, 1947, (entitled Basic Post-Surrender Policy for Japan) declared:

> "*The nations composing this Commission,* with the object of fulfilling the intentions of the Potsdam Declaration * * * *are therefore agreed* * * * To complete the task of * * * stern justice to war criminals * * * ."

Article II. 1 of this Decision provided that—

> "The occupation shall have the character of an operation in behalf of the Powers that have participated in the war against Japan. The principle of participation in the occupation of Japan by forces of these nations is affirmed. The occupation forces will be under the command of a Supreme Commander designated by the United States."

Article III. 2 of this Decision declared that—

> "Stern justice shall be meted out to all war criminals * * * Persons charged by the Supreme Commander or appropriate United Nations agencies with being war criminals shall be arrested, tried and, if convicted, punished: Those wanted by another of the United Nations for offenses against its nationals shall * * * be turned over to the custody of such other nations."

Moreover, FEC Policy Decision of April 3, 1946 defined war crimes and authorized the Supreme Commander for the Allied Powers to appoint "special international courts". This Decision then stipulated—

> "*In the appointment of the international Courts* and *and in all trials before them, the international character of the courts and of the authority by which they were appointed and under which they act should be properly emphasized and recognized*, particularly in dealings with the Japanese people. The Supreme Commander for the Allied Powers should have (1) the responsibility for carrying out the judgments of any international courts appointed by him and (2) the power to approve, reduce or otherwise alter any sentence imposed by any such courts, but not to increase the severity thereof * * *." (Italics supplied)

This Decision also sharply differentiates national tribunals from international tribunals, stating that—

> "The military command of any nation (including the United States) participating in the occupation * * * may establish special national military courts to deal with war criminals not held or requested by the Supreme Commander for trial by an international military court or tribunal * * *."

The international character of the International Military Tribunal for the Far East was recognized in the Special Proclamation of the Supreme Commander of January 19, 1946, in which he declared—

> "Whereas, the Governments of the United States, Great Britain and Russia at the Moscow Conference, December 26, 1945, having considered the effectuation by Japan of the Terms of Surrender, with the concurrence of China have agreed that the Supreme Commander shall issue all orders for the implementation of the Terms of Surrender, Now, Therefore, I, * * * by virtue of the authority conferred upon me, in order to implement the Terms of Surrender, which requires the meting out of stern justice to war criminals * * *."

and established the International Military Tribunal for the Far East.

Article 17 of the Charter of the International Military Tribunal for the Far East, which dealt with review by

the Supreme Commander of the determinations of the Tribunal, does not recognize the possibility of further review of the international tribunal by national courts, such as the Supreme Court of the United States, it said:

> "The record of the trial will be transmitted directly to the Supreme Commander for the Allied Powers for his action thereon. A sentence will be carried out in accordance with the order of the Supreme Commander for the Allied Powers, who may at any time reduce or otherwise alter the sentence except to increase its severity." (Trial of Japanese War Criminals, Dept. of State Publication 2613, Far Eastern Series 12 (1946).

In recapitulation, the texts which have been examined establish that:

(1) The International Military Tribunal for the Far East is an international tribunal, representing co-equal allied national states.

(2) The jurisdiction of the International Military Tribunal for the Far East with respect to the convicted Japanese is exclusive and is subject solely to the review of the Supreme Commander for the Allied Powers.

(3) Unilateral assertion of jurisdiction by the Supreme Court of the United States or by any other national court would contravene international agreements entered into by the United States with other sovereign allied states in the Yalta Agreement, the Potsdam Declaration, the terms of reference with respect to the punishment of Japanese war criminals formulated at the Moscow Conference of Foreign Secretaries in December 1945, the policy decisions of the Far Eastern Commission and the Special Proclamation of the Supreme Commander for the Allied Powers.

CONCLUSION.

Full effect should be given to the international agreements in which allied nations have participated. The exercise of Jurisdiction by this Court would violate such agreements, and impair relations among the powers concerned. This Court is without Jurisdiction to grant the petition for a writ of habeus corpus prayed for by the Petitioners herein.

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